UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
FIVE POST OFFICE SQUARE, SUITE 100
BOSTON, MASSACHUSETTS 02109

April 22, 2010

Mr. James Pease
Vermont Department of Environmental Conservation
103 South Main Street
Waterbury, VT 05671

Re: Comments on Vermont's Draft MS4 Permit

Dear Mr. Pease:

Enclosed are EPA's comments on the Department of Environmental Conservation's ("DEC") draft small MS4 general permit. The comments consist of substantive concerns and recommendations in the beginning, followed by suggestions focused on improving clarity.

Pursuant to the MOU between EPA and Vermont related to the state NPDES program, EPA normally reviews draft permits for purposes of determining consistency with federal requirements and, if necessary, identifying any objections. Proposed permits need not be submitted except in the circumstances described in 40 C.F.R. § 123.44(j). In this case, given the scope and complexity of the permit, we believe that there will be significant public comment on the permit, and it is also likely that changes will be made to the permit. Therefore, pursuant to 123.44(j), we expect DEC to submit a proposed permit to EPA for review. In the event that we would have any comments on, objections to, or recommendations about the proposed permit, we would provide those as expeditiously as possible, but no later than 90 days from receipt of the proposed permit. See 40 C.F.R. § 124.44(a)(2).

We appreciate all the good work that went into the preparation of the draft permit, and we will provide any assistance we can as you consider revisions. For more information on these comments, please contact Thelma Murphy at 617-918-1615.

Sincerely,

for

Stephen S. Perkins, Director
Office of Ecosystem Protection

Enclosure

EPA comments on the Jan 2010 Draft VT Small MS4 General Permit

PART I

Permit Coverage

1. Part I.A -- We suggest you reference the regulation – 40 CFR 122.32(a)(1) as part of the explanation of MS4s covered by the permit.

2. Part I.A.2 – It's not clear how the MS4s described in this subpart are different from the MS4s located in urbanized areas, described in Part A.1. Is this a designation of non-urbanized areas of MS4s when they are in watersheds of stormwater impaired waters? If so, a separate designation process is needed.

Eligibility

3. Part I.B -- We recommend the eligibility section be divided into two sections. One section, describing who is eligible for the permit, could contain Part B.1.a – e. The other section, describing allowed discharges, could contain Part B.1.f.

4. In Part I.B.1.f.2.h Rhodamine dye is allowed to be commingled with stormwater discharges. Given that Rhodamine is not one of the pollutants with which stormwater can be commingled under 40 CFR 122.34(b)(3), this provision should be deleted.

Limitation on Coverage

5. Part I.C.1.a.2 – Who makes the determination whether a discharge is a "substantial contributor of pollutants"? This should be stated in the permit.

6. Part I.C.1.d -- The permit does not authorize "discharges of any pollutant for which a WQRP or a TMDL has been established or approved by EPA…unless the discharge is consistent with that WQRP and TMDL". With respect to the federal part of that provision, we recommend using the regulatory language from 40 CFR122.44(d.)(7)(B): that the permit does not authorize discharges that are not consistent with the assumptions and requirements of any available wasteload allocation for the discharge approved by EPA pursuant to 40 CFR 130.7.

7. Part I.C.2, as currently written, doesn't appear to fit well with the heading of the section. We suggest the text be changed to something similar to: "The following stormwater discharges are not authorized by this permit, and require coverage under other permits:" Then continue with the list.

8. The last item on the list in part I.C.2 concerning post construction stormwater management could be misleading since one of the minimum control measures addresses post construction stormwater management. The permit and the fact sheet should indicate which post construction stormwater is managed under the MS4 and which is managed by a different permit.

Application for Permit Coverage

9. Part I.D.3 – When does the operator of an MS4 change? Is this a provision that is intended only to apply to non-municipal MS4s?

PART II

Contents of the Notice of Intent

10. Part II.B.2.a of this section – we strongly suggest deleting "if available" when asking to identify the number of outfalls to each receiving water. This information should have been gathered during the previous permit term and should be available.

11. Part II.B.2.d should be more specific about expected information relating to requirements to protect water quality. There is no section in the NOI that relates to this. For example, the NOI should request information about receiving waters and impairments, numbers of outfalls, all applicable wasteload allocations (WLAs), and what practices and programs will be used (and perhaps have already been used) to meet requirements of applicable TMDLs.

PART IV

Water Quality Based Requirements

12. Part IV.A. The last sentence of this paragraph limits the water quality based requirements of the permit to "…requirements found in Subparts IV.B and C that relate to discharges to impaired waters for which an approved TMDL exists…" This limitation is not accurate. The requirements in Parts IV.A through IV.D are all water quality based requirements and should be referenced as such. The permit should also make clear that the requirements in Part IV.B apply to discharges to impaired waters, with or without an approved TMDL (this could be accomplished by simply deleting the phrase "for which an approved TMDL exists" from the last sentence in Part A).

Requirements to Meet Water Quality Standards

13. Part IV.B.2 – A time-frame between when the permittee becomes aware that a discharge is causing a problem and when the problem must be fixed or addressed should be stated in the permit. For example, EPA's draft North Coastal MA MS4 permit indicates that an MS4 must take corrective action as soon as possible but no later than 60 days after becoming aware of such a discharge.

Discharges to Impaired Waters

14. Part IV.C -- The permit should identify applicable TMDLs and WLAs and the MS4s that are subject to them.

15. Part IV.C -- The permit should identify MS4s that discharge to impaired waters.

16. Part IV.C.1.b states that compliance with the permit should be sufficient to satisfy a TMDL where there isn't a specific WLA for the MS4. It isn't clear how the permit can say that its terms satisfy numeric and narrative water quality standards, and also meet TMDL requirements such as an aggregate WLA, including an appropriate portion of an aggregate WLA, without requiring any additional work. One way to address this would

be to remove this presumption. Alternatively, the permit could include the presumption only if it required an analysis indicating that selected BMPs are sufficient to meet TMDL requirements. See comment 25, below, for related concerns pertaining to the Lake Champlain TMDL.

17. Part IV.C.1.c states that where a WLA exists, the permittee shall describe in its annual reports what it has done to control discharges. Consistent with the comment above, it should state that the permittee must control discharges consistent with the WLA, and then provide in its annual report, proof that it is undertaking actions that meet that goal.

18. Part IV.C.1.d -- On meeting TMDLs, the permit doesn't provide upfront instructions to undertake any specific actions other than procedural requirements such as to develop plans, report on progress, etc. The permit needs to state that the permittee shall meet the reductions consistent with the assumptions and requirements of the TMDL. It should then lay out a process by which the permittee must satisfy concrete permit conditions. As currently drafted, the permit lays out a process by which a plan is developed, and then requires implementation of the plan. Instead, the permit should set specific enforceable requirements to meet the applicable WLA, and then lay out a process.

19. Part IV.C.1.d.2 requires that the MS4 "shall work cooperatively with other MS4s that discharge to the same impaired watershed" to develop a comprehensive Flow Reduction Plan (FRP). "Work cooperatively" isn't a defined term, and even if it were, it would be difficult to enforce. Again, the permit should set out specific, concrete requirements, and let the permittee work cooperatively with another MS4 so long as it achieves the reductions. Additionally, given all the prior work and analysis completed for these watersheds by DEC and the municipalities, three years seems longer than necessary for development of the FRP. Two years may be reasonable, but the permit needs to include a justification for why the time period selected represents the quickest pace possible.

20. Part IV.C.1.d.2.a -- The FRP should also take into account reductions expected from parcels within the watershed that are regulated under the RDA permit.

21. Part IV.C 1.d.2.b sets a design and construction schedule "as soon as practicable, but no later than ten years from the effective date of the permit or the permittee's designation as a regulated MS4, whichever is later." The regulations require that where a compliance schedule is appropriate, it require compliance "as soon as possible." So "practicable" should be changed to "possible", and there should be a showing that a compliance schedule is appropriate. EPA has guidance on the latter, see "Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits" (2007), available at: http://cfpub.epa.gov/npdes/docs.cfm. However, more importantly, EPA is not aware of any basis for allowing compliance schedules at all in this permit to meet water quality based terms and conditions, because the Vermont water quality standards do not currently provide authority for compliance schedules.

22. Part IV.C.1.d.3 says that the Secretary may adjust the permittee's flow restoration targets during the term of the permit if justified. This would need to follow the permit modification rules.

23. Part IV.C.1.d .6 requires a statement from the permittee by the BMP designer 60 days after complete implementation of a BMP that it is operating in compliance with the plans and the permit, but there does not appear to be a requirement to subsequently review the operation of the BMP and provide updated information on its operation. The permittee should be required to periodically review the operation of the BMP and ensure that it is operating as designed.

24. Part IV.C.1.e states that a permittee must be consistent with the recommendations applicable to its MS4 in the implementation section of the Lake Champlain TMDL and any future TMDLs. We recommend that the permit indicate that if an MS4 becomes subject to a TMDL approved during the permit term, VANR will notify the MS4 of any additional requirements needed to comply with the new TMDL.

25. Part IV.C.1.e references recommendations in the implementation section of the Lake Champlain TMDL. The section should also reference applicable recommendations in the current (January 2010) Lake Champlain TMDL implementation plan posted on ANR's website. In addition, this section should be expanded to include specific phosphorus WLAs for each MS4 along with a specific process for addressing Lake Champlain TMDL requirements.

The Lake Champlain TMDL identified runoff from developed areas such as the MS4s as a major portion of the phosphorus load to the lake. While the TMDL did not include MS4-specific WLAs, the permit should still include WLAs for each MS4 derived from information contained in the TMDL. For example, the WLA for developed land within the applicable lake segment watershed could be compared with available estimates of actual phosphorus loading from that developed land to calculate percent reductions needed for each MS4. Alternatively, the acreage of an MS4 area could be compared with the total acreage of developed land within the applicable lake segment watershed to determine a WLA for the MS4 proportional to the WLA for the larger developed land area.

The MS4 permit could then require compliance with these established phosphorus WLAs, and lay out a process to meet these requirements similar to that proposed for the stormwater TMDLs, assuming the compliance schedule authorization issue raised above (in comment 21) is resolved. Where applicable, the flow restoration plans could be used as a starting place for phosphorus restoration plans, given that many of the BMPs used to reduce flow volume will also reduce phosphorus. In some cases, the FRP developed to meet the stormwater TMDL requirements might also meet the Lake Champlain TMDL requirements. In other cases, additional BMPs may need to be added into the plan to sufficiently address phosphorus reduction needs.

26. Part IV.C.1.f states that "the assessment of whether a SWMP is consistent with TMDL recommendations will be based on the implementation and maintenance of BMPs, not on estimates or measurements of pollutant loading." It may not be possible to demonstrate consistency with the Lake Champlain TMDL without estimates of pollutant loading. The process described in the above comment would establish specific phosphorus reduction targets for each MS4, and progress toward meeting these targets would be tracked using estimates of the amount of phosphorus reduced with selected BMPs.

Minimum Control Measures

27. Part IV.G. Overall comment: All ordinances required by the previous permit should be in place. Additional time should not be given in this permit; instead, the permit should note the deadline(s) specified in the previous permit. For other provisions not required to be completed under the previous permit, the permit should include expected time frames for completion of activities.

These requirements are very similar to those in the 2003 permit. The new permit should not just require the same actions and level of effort as was required under the 2003 permit. The requirements in the new permit should build on work accomplished during the first term. For example, basic illicit discharge detection and elimination elements (including mapping) should have been put in place during the first term, and no additional time should be provided to develop these elements. These provisions could be referenced as items required to be put in place under the previous permit. The new permit should focus on things like tracking accomplishments of the provisions put in place during the first term – for example, the number of illicit discharges found, the number eliminated, volume of sewage removed, etc. For education programs, the permit should ensure that all the options presented provide for the identification of specific messages, target audiences for these messages, and expected outcomes (as is required in Part G.1.b).

28. Part IV.G.2.a – Please change "implement" to "continue to implement". Also, similar to the above comment on education programs, the permit should ensure that the public involvement requirements in part G.2.b are incorporated into all of the options presented, including participation in the regional program and the options described in Part G.2.a. Further, note that items 8 and 10 of subsection G.2.a allow the Secretary to arbitrarily modify these requirements. The ability of the Secretary to allow these modifications should either be removed from the permit, or moderated with decision standards the Secretary must follow when allowing these modifications.

29. Part IV.G.4.a. states:

> "Instead of adopting its own program to regulate storm water runoff from construction activities that meet the requirements of 40 C.F.R 122.34(b)(4) a permittee may qualify for coverage under this general permit by developing and implementing a program to assist the Secretary in the Agency's regulation of such discharges."

The permit must require that the MS4 develop and implement a program to manage construction runoff. Developing and implementing a program that assists the Secretary does not satisfy that requirement. It is also impossible to enforce a program that relies on a concept such as assistance – something that can't be clearly interpreted. There are provisions in the MS4 regulations that allow a permittee to incorporate a "qualifying local program" [see 40 CFR 122.34]; or that allow a permittee to have a third party satisfy one of the MS4's six minimum measures [see 40 CFR 122.35], but the VT permit doesn't satisfy the requirements of either.

The requirement also shields the permittee from complying with an NPDES mandated requirement (enforcing post-construction controls) by allowing a permittee to comply with a non-NPDES based permit requirement—assisting the state.

This problem is present in the major provision dealing with post construction runoff control and in a number of the subsections that rely on the same "assistance" construct.

30. Part IV.G.4.a.2 states:

> "(2) Procedures to assist the Secretary in inspecting permitted construction sites for compliance with the conditions of their permits. In conducting such inspections the permittee's staff will not be expected to be familiar with the erosion control plans. However, the permittee should inspect for obvious signs of noncompliance such as eroding soils and turbid waters. The permittee will only be expected to report suspected violations to the Agency and not to initiate an independent enforcement action."

This process—where the MS4 doesn't need to be familiar with the erosion control plan—also sets up a scheme where an MS4 could conduct a site inspection on a site with violations, find no violations (because the inspector hasn't seen the plans), and report that to the State. The result is a system that inadvertently hides violations, or results in inspections that produce little useful information. The scheme is detrimental to an effective enforcement program, not an advancement of it. This section should be changed to require permittee's staff to be familiar with the erosion control plans (simply removing the word "not" will do it), and to inspect for compliance with these plans along with signs of noncompliance such as eroding soils and turbid waters.

In addition, most inspections should be stipulated to occur during wet weather (or as soon after a rain event as possible) when violations will be more evident. And a timeframe for reporting suspected violations should be specified.

31. Part IV.G.4.b at page 23 states:

"The permittee must adopt an erosion control ordinance, or zoning or subdivision regulation, or other regulatory mechanism, or if a nontraditional MS4, a policy which, at a minimum, regulates development activities not subject to state or federal erosion control requirements."

If the permit is using the requirements of another program to substitute for the NPDES MS4 requirements, it must, as discussed above, satisfy the qualifying local program provision of

the NPDES MS4 regulations or the or third party implementer provision. Implying that an MS4 need not create a program where a state or federal program covers that same issue does not satisfy the regulations.

32. Part IV.G.5.a, at the bottom of page 24, states:

"To qualify for coverage under this general permit a permittee must develop, if it has not already done so, implement, and enforce a program to reduce pollutants in any post-construction stormwater runoff to the small MS4 from activities that result in a land disturbance of greater than or equal to one acre and that are not subject to regulation under the Agency's post-construction stormwater management permit program. The permittee must also develop and implement a program to assist the Secretary in the regulation of sites, *which are within the jurisdiction of the Agency's post-construction storm water management permit program.*

This suffers from the same problem as the provision discussed in the above comment. The same problem arises in the following provision on page 25:

> d) For stormwater runoff that discharges into the small MS4 from new development and redevelopment projects that disturb greater than or equal to one acre (including projects less than one acre that are part of a larger common plan of development or sale) *and that are not subject to regulation under the Agency's post-construction stormwater management permit program* the permittee must adopt, if it has not already done so, an ordinance, planning, zoning and subdivision regulation, or other regulatory mechanism, or if the permittee is a nontraditional MS4, a policy that....

33. Part IV.G.5.b -- The review of existing policies, ordinances, etc. should include an assessment of design standards for streets and parking lots to determine whether any changes are needed to support low impact design options. The review should also include an assessment of whether changes are needed to allow the following types of practices: Green roofs; infiltration practices such as rain gardens, curb extensions, planter gardens, porous and pervious pavements, and other methods to infiltrate stormwater using landscaping and structured or augmented soils; water harvesting devices such as rain barrels and cisterns, and the capture and use of stormwater for non-potable uses. These assessments should be part of the SWMP. The permittees should report in each annual report on progress toward making these practices allowable and/or required where appropriate. The above list of low impact practices (or one like it) should also be referenced for clarity purposes in Part IV.G.5.d.2, where low impact practices are required to be included in new ordinances and policies.

34. Part IV.G.5.e. requires the MS4 to assist the Secretary in inspecting permitted development and redevelopment sites subject to the state regulations; as with the parallel provision relating to construction at sites greater than one acre, above, it says that MS4 inspectors will not be expected to be familiar with the post-construction site plans. See comment above on Part G.4.a.2.

35. Part IV.G.6.a – The list of activities required to be covered by the operation and maintenance plan should include the proper disposal of snow. A time-frame should be specified for the completion of the operation and maintenance plan.

36. Part IV.G.6.a.1. – Participation in the Agency's Municipal Compliance Assistance Program is not likely to achieve full compliance with this measure, especially to the extent that the compliance assistance program functions as a "facility audit program" as implied in the draft permit. Most audit programs merely identify issues that need to be addressed, but stop short of fully correcting the problems. If this is the case with the VT compliance program, the permit should indicate that participation in the Agency's Municipal Compliance Assistance Program may constitute partial compliance with this measure.

37. Part IV.G.6.a.3 – Is the listing of industrial facilities limited to those that discharge directly to an MS4? Or is it expected to include all industrial facilities within the municipality regardless of discharge location? The permit should make this more clear.

Sharing Responsibility

38. Part IV.H (page 29) states:

> "Implementation of one or more of the minimum measures or measures taken to implement a TMDL may be shared with another entity, or another entity may fully take over the measure. A permittee may rely on another entity only if:
>
> 1. The other entity, in fact, implements the control measure;
> 2. The particular control measure, or component of that measure, is at least as stringent as the corresponding permit requirement.
> 3. The other entity agrees to implement the control measure on the permittee's behalf. Written acceptance of this obligation is expected. This obligation must be maintained as part of the SWMP. If the other entity agrees to report on the minimum measures or TMDL implementation activities, the permittee must supply the other entity with the reporting requirements contained in this permit. If the other entity fails to implement the control measure on behalf of the permittee, then the permittee remains liable for any discharges due to that failure to implement."

This parallels section 122.35 in the NPDES MS4 regulations that does allow for sharing of responsibility. But it departs in at least two significant regards.

The provision numbered 2 above should be rewritten as follows:

> "2. The particular control measure, or component of that measure, is at least as stringent as the corresponding **NPDES** permit requirement."

As currently drafted, VT's permit has requirements that are less stringent than the NPDES regulations allow. The MS4s can only share implementation of those permit conditions that are as stringent as the NPDES regulations. Once the permit requirements are as stringent as the NPDES regulations, an MS4 can share that obligation with a third party.

The other problem relates to the following language:

> "3. The other entity agrees to implement the control measure on the permittee's behalf. Written acceptance of this obligation is expected."

If it is to be an enforceable agreement, which it needs to be, written acceptance is essential to the agreement. The word "expected" should be replaced by "required."

Reviewing and Updating Stormwater Management Plans

39. Part IV.I.2.b.1 on page 30 allows for a permittee to replace a BMP where it is "unfeasible."[sic] The permit then states that the submission must include an analysis of why the BMP is ineffective or infeasible (including cost prohibitive)."

Costs should not be a basis for allowing a permittee to avoid implementing a BMP if the purpose of the BMP is to achieve water quality standards. Under the provision, a permittee can always replace an ineffective BMP with an alternative, and environmental effectiveness, not cost, is the appropriate criterion.

PART V: Monitoring, Record Keeping and Reporting

40. Part V.A.2 -- The section referenced in this paragraph (Subpart IV.G.3.a.4) does not specifically require monitoring as part of the illicit discharge program. We suggest changing the wording to: "If the permittee conducts monitoring of illicit discharges, all samples and measurements taken shall be representative of the monitored activity." If the State expects monitoring as part of the illicit discharge program, that expectation should be clearly stated.

Suggestions for Minor Clarifications

1. Part I.A -- In the last paragraph of this section, we suggest you delete the word "municipalities" and just list the MS4s that are regulated by the permit.

2. Part I.B. (Eligibility) The regulation cited, 40 CFR 122.26(b)(16), defines "small municipal separate storm sewer systems"; we suggest adding the word "small" before MS4. The new sentence would read "This permit authorizes discharges of stormwater from small MS4s…"

3. Part IV C.1.d establishes compliance dates for some conditions based on either the effective date of the permit or the date the permittee is designated, whichever comes later. To account for newly designated MS4s, consider linking due dates to the authorization date rather than the designation date, because there may be a lag time between the two. In another section the date of issuance is used. Is the date of issuance different than the effective date? Whichever time is used, it should be used consistently throughout the permit.

4. Part IV.F.3 mentions "behavioral and institutional changes necessary to implement the BMP" – who is expected to initiate these changes? What is an MS4 expected to do with this information?

5. Part IV.G.3.a.2 -- We suggest you encourage georeferencing of the storm sewer map developed; work performed using AutoCad is not necessarily georeferenced.

6. Part IV.G.4.a.4 – It is unclear which permit is being referenced.

7. Part IV.G.6.a.2 – We suggest rewording to say "…subject to an individual NPDES permit for its industrial activity…" Use of the term "Multi-Sector" implies the Multi-Sector General Permit and as worded this could cause confusion.

8. Part VI.H -- **Signatory Requirements** -- provides:

> "All Notices of Intent, reports, certifications, or required information submitted to the Agency, or that this permit requires be maintained shall be signed by a principal executive officer, ranking elected official or other duly authorized employee"

We recommend the State consider including after "duly authorized" the following language: "consistent with 40 CFR 122.22(b)", to define what "duly authorized" means in the permit context.